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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the matter of) WT Docket No. 94-147
JAMES A. KAY, JR.)
Licensee of one hundred fifty-)
two Part 90 licenses in the)
Los Angeles, California area.)

To: The Commission

**SUPPLEMENT TO CONSOLIDATED BRIEF
AND EXCEPTIONS OF JAMES A. KAY, JR.**

James A. Kay, Jr. ("Kay"), by his attorneys, hereby files this Supplement to Consolidated Brief and Exceptions to the Summary Decision of Administrative Law Judge Richard L. Sippel ("Judge"), FCC 96D-02, released May 31, 1996 ("S.D."), in the above-referenced matter. In support thereof, Kay submits the following:

1. On July 1, 1996, Kay filed his Consolidated Brief and Exceptions to the Summary Decision of Administrative Law Judge Richard L. Sippel (the "Exceptions").

2. As Kay argued in the Exceptions, the Presiding Judge's legal conclusions contained in the S.D. were fatally flawed, in part, because (Exceptions at page 5):

In revoking Kay's licenses and taking away the business he has built over two decades, the Judge did not even permit Kay to present any evidence in support of his case. Instead, the Judge has revoked the licenses in a summary manner. The evidence provided by the [Wireless Telecommunications] Bureau consisted of unsworn testimony offered by the prosecutorial staff of the Commission at a Prehearing Conference in which Kay was neither requested, required or permitted to proffer expert testimony on his behalf and in

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the face of sworn affidavits from Kay which contradict the staff's unsworn testimony. The use of such an extraordinary procedure to revoke licenses violates every rule of procedural due process and raises the question of why elemental fairness was not accorded to Kay.

3. Throughout these proceedings, Kay has sought to engage in formal and informal discovery in order to prepare himself against what he has long believed to be unfounded allegations on the part of the Bureau. The Bureau has strenuously fought every attempt by Kay to secure documents and other evidence that would exonerate him.¹

4. To make matters worse, the Presiding Judge, by taking the route of granting a summary decision, wrongfully denied Kay

¹ The Commission has vigorously contested Kay's efforts to the point where Kay has been forced to file an appeal of the Commission's continued denial of his Freedom of Information Act requests (Kay's only means to discover information in the Commission's files) for information concerning the nature of the Commission's charges against him. See James A. Kay, Jr. v. Federal Communications Commission, Civil Case No. 96CV00660, United States District Court for the District of Columbia. As demonstrated by an October 2, 1996 letter written by Lori Hyman, Esquire, counsel for the FCC, to United States Bankruptcy Judge Robert W. Alberts, a copy of which is attached as Exhibit "A" and incorporated herein by reference, the Commission's efforts to prevent Kay from obtaining information relevant to the HDO has continued subsequent to the issuance of the S.D.. Judge Alberts is presiding over the Chapter 13 bankruptcy case filed by Charles and Cornelia Dray (Case No. SB 95 25766 RA, United States Bankruptcy Court for the Central District of California). Ms. Dray has been identified by the FCC as a potential witness in its case. Kay is a creditor in the Dray bankruptcy case as a result of the Drays' breach of a contract. The Commission does not otherwise have an interest in the Dray bankruptcy case. In a recent ruling, Judge Alberts, in complete disregard of the request made in Ms. Hyman's letter, authorized Kay, by counsel, to examine Ms. Dray pursuant to Fed. R. Bankr. P. 2004. Kay's counsel conducted an examination of Ms. Dray pursuant to Fed. R. Bankr. P. 2004 on December 16, 1996.

the opportunity to present evidence in opposition to the ambiguous charges set forth in the Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture (the "HDO"), issued on December 13, 1994.

5. Despite the tremendous obstacles placed by the Commission in his way, Kay has now informally gathered evidence which clearly demonstrates that the revocation of Kay's licenses, upon the charges presented in the HDO, is improper since the Commission did not have sufficient evidence upon which to bring them in the first place and, in fact, has taken extraordinary measures to build a case against Kay.

6. That the Bureau did not even have a prima facie case against Kay is clear from documents Kay has secured. The Bureau, in its own memorandum, has admitted that its investigation was incomplete at the time of issuance of the HDO and it needed to gather additional evidence to support the charges set forth in the HDO through its own discovery. See September 15, 1994 Memorandum prepared by W. Riley Hollingsworth, attached hereto as Exhibit "B" and incorporated herein by reference. As set forth below, the deficiencies in the HDO are significant.

7. During limited permissible discovery in this case, the Bureau provided Kay with a list of potential witnesses. See Bureau's Answers to Interrogatories, dated March 9, 1995, attached hereto as Exhibit "C" (without attachments) and incorporated herein by reference. Among others, the Bureau identified Don Ro, Inc. d/b/a Accurate Concrete Sawing, as an

entity "believed to have direct knowledge of relevant facts relating to instances of abuse of process." See Commission Response to Interrogatory 5-1 (pages 18 and 19).

8. As detailed in the Declaration of Richard G. Rose, President of Don Ro, Inc. d/b/a/ Accurate Concrete Sawing, dated May 13, 1996, attached hereto as Exhibit "D" and incorporated herein by reference, the details of the Bureau's consultation with Mr. Rose consisted of a brief conversation (1 or 2 minutes) with Mr. Rose on or about February 17, 1995, two (2) months after the HDO was issued. The Commission has had no subsequent communications with Mr. Rose.

9. As noted in the Affidavit of Richard Rose, dated November 5, 1996 (attached hereto as Exhibit "E" and incorporated herein by reference), Mr. Rose, considered by the Bureau to be one of the Commission's chief witnesses, has "no knowledge, direct or indirect, that Kay or any business owned or operated by Kay has conducted business in an unlawful or illegal manner or that Kay has violated the Communications Act of 1934, as amended, or any other Commission rule or regulation." This is hardly the type of evidence that would serve as the basis for revoking Kay's licenses, let alone for putting him through the time, expense, and uncertainty of a revocation hearing.

10. The Bureau also attached to its Answers to Interrogatories (Attachment 21 thereto) a "complaint letter" dated June 23, 1992, submitted by Terry Peterson of A.C. Peterson Co., Inc., a copy of which is attached hereto as Exhibit "F" and

incorporated herein by reference. The letter references a problem A.C. Peterson Co., Inc. experienced with its two way radios due to "a jamming technic [sic] utilized by James Kay." During his October 18, 1996 deposition (taken in conjunction with a private lawsuit pending in California), Mr. Peterson testified as follows (relevant pages of the transcript are attached hereto as Exhibit "G" and incorporated herein by reference):

Q. It says "This was due to a jamming technique utilized by James Kay." How did you discover that?

A. Based on what Jim Doering told me.

Q. That wasn't anything that you came to --

A. No.

Q. Please let me finish. That wasn't anything that you came to on your own as far as tracking down the source of it; is that correct?

A. Correct

(Page 22)

* * *

Q. When you wrote this letter, then, the information that you included in this letter with regard to jamming was purely based, then, on the information that you received from Mr. Doering; is that correct?

A. That would probably be correct.

Q. Can you think of where else you might have gotten information? I notice you qualified it with "probably." If you have information from another source other than Mr. Doering can you tell me what that is?

A. I wouldn't have any other source.

(Pages 25 and 26)

* * *

Q. Did you ever find out that it was, in fact, Mr. Kay's equipment at all that was causing the problem?

A. No.

(Page 30)

11. This sworn testimony evidences that Mr. Peterson has recanted the implicit suggestion made in his June 23, 1992 letter that he has direct knowledge of wrongful conduct committed by Kay. In fact, Mr. Peterson admits that the source of his statement that Kay was causing his company's radio problems was not himself but Jim Doering, a known competitor of Mr. Kay who has a pecuniary interest in the revocation of Kay's licenses. This statement, which does not identify the Doering hearsay and Doering's self interests, has little weight before any impartial trier of fact.

12. As another example of deficiencies in the FCC's investigation, in its response to interrogatories (Attachment 2 thereto) the FCC provided Kay with a letter, dated December 9, 1991, from William Drareg of William Drareg & Associates, with a business address of 1800 Century Park, Century City, Los Angeles. A copy of the December 9, 1991 letter from Mr. Drareg is attached hereto as Exhibit "H" and incorporated herein by reference. Mr. Drareg's letter alleges that Kay violated certain FCC rules and the Communications Act of 1934.

13. As part of Kay's informal discovery, Kay and his attorneys took monumental efforts to locate Mr. Drareg, including searching various directories, databases, California state

records and contacting the management of the building located at 1800 Century Park, Century City. Furthermore, a February 5, 1996 letter from Kay's attorneys to the FCC asking for information as to the whereabouts of Mr. Drareg has remained unanswered. Based on this exhaustive search, it appears that neither Mr. Drareg nor William Drareg & Associates have ever existed, yet is relied upon anyway by the FCC.

14. The name "Drareg" is additional evidence that the author of the December 9, 1991 letter is likely to be a competitor of Kay. "Drareg" spelled backward is "Gerard". Gerard Pick (prior to his death in 1995) was one of the chief complainants about Kay to the FCC and, along with his son, Harold, are parties that have submitted multiple complaints to the FCC that appear to have instigated the FCC's investigation of Kay.

15. The Rose documents, the Peterson deposition, and the "Drareg letter" point to the clear absence of any evidence against Kay and the glaring deficiencies in the Bureau's case as expressed in the HDO. Kay believes that were he to have the opportunity to engage in discovery of other witnesses², he would

² Kay also recently learned that another of the FCC's chief witnesses, David Pfeifer, has a history of abuse of hallucinogenic drugs including cocaine, amphetamines, marijuana and PCP, as well as a history of abusing alcohol. See Letter from Bruce S. Gillis, M.D., M.P.H. dated September 28, 1990, attached hereto as Exhibit "I" and incorporated herein by reference. Based on several depositions that Kay has taken in conjunction with a private lawsuit pending in California, Kay also recently learned that another FCC witness, Edward Cooper, solicited and prepared statements from Cooper's co-workers and submitted the same to the FCC to support a finder's preference action filed by

learn that they, too, do not possess any relevant or personal knowledge which supports the Bureau's charges or are otherwise unqualified to testify.

16. From what Kay has learned, it is now obvious why the Bureau has prepared so vigorously for summary decision. As the Bureau lacks any evidentiary case to present against him, the Bureau's only basis for seeking revocation is to press for summary decision where no evidence of the merits need be proffered. This gross injustice was made worse by the fact that the Presiding Judge never permitted Kay to defend himself. The Commission must ask why Kay is being railroaded this way if there is no evidence against him. The only way to resolve this is to reverse the S.D. and direct that the case be tried. Kay then will be able to prove that the charges against him are entirely without merit.

Cooper against Kay. The statements Mr. Cooper obtained from his co-workers contain information that Kay has reviewed and finds inaccurate and, as evidenced by sworn deposition testimony, were not based on the personal knowledge of the signing party. Rather, the statements were prepared, in whole or in part, by Mr. Cooper. A third witness, Richard Lewis, testified under oath that he had no complainants about Mr. Kay or the two-way radio service that Mr. Kay's company was providing, but that W. Riley Hollingsworth, of the Wireless Telecommunications Bureau, during a personal visit to California, advised Mr. Lewis that the FCC license held by his former employer, the Fullerton School District, was changed from a GP to a GB. Hollingsworth subsequently drafted a "witness statement" for Mr. Lewis to sign which implies that Kay wrongfully changed the Fullerton School District's license. However, because Kay was never given an opportunity to present his case, the Bureau, the Presiding Judge and the Commission are unaware of the fact that Kay had nothing to do with the change in the Fullerton School District license from a GP to a GB, but that the change was a unilateral action on the part of NABER, which is the frequency coordinator for the service.

WHEREFORE, considering the errors of and evidence not supported in the record in this case, all as set forth in the Exceptions, and, as set forth above, the deficiencies in the HDO and the prejudice suffered by Kay as a result of the Presiding Judge's unwillingness to permit him to obtain and present evidence in opposition to the charges set forth in the HDO, the S.D. must be reversed and remanded and the matter set down for hearing before a new Administrative Law Judge.

Respectfully submitted,

JAMES A. KAY, JR.

By: 

Barry A. Friedman
Scott A. Fenske

Thompson Hine & Flory LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 331-8800

Dated: January 17, 1997

CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the foregoing James A. Kay Jr.'s Supplement to Consolidated Brief and Exceptions was hand-delivered on this 17th day of January, 1997 to the following:

Gary P. Schonman, Esquire
Federal Communications Commission
Hearing Branch
Mass Media Bureau
Suite 7212
2025 M Street, N.W.
Washington, D.C. 20554;

John I. Riffer, Esquire
Assistant General Counsel
Office of General Counsel
Federal Communications Commission
Room 610
1919 M Street, N.W.
Washington, D.C. 20554

and sent via first-class mail, postage prepaid on this 17th day of January, 1997 to:

W. Riley Hollingsworth, Esquire
Deputy Associates Bureau Chief
Wireless Telecommunications Bureau
1270 Fairfield Road
Gettysburg, Pennsylvania 17325-7245



Scott A. Fenske

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U. S. Department of Justice

ALW:LCHyman

Washington, D.C. 20530

Telephone:
(202) 514-3704

October 2, 1996

VIA FACSIMILE AND REGULAR MAIL

The Honorable Robert W. Alberts
United States Bankruptcy Court
Central District of California
105 Federal Building
699 North Arrowhead Avenue
San Bernardino, California 92401

Re: In Re Charles Dray, Cornelia Dray
Case No. SB 95 25766 RA

Dear Judge Alberts:

We are writing on behalf of the Federal Communications Commission ("FCC") regarding the above-captioned case. It is our understanding that a hearing is scheduled for October 2, 1996, in this matter.

The FCC may have an interest in this action because, we understand, Mrs. Cornelia Dray is in possession of a document which is protected from disclosure under the law enforcement exemption of the Freedom of Information Action ("FOIA"), 5 U.S.C. § 552. Mr. James Kay, a creditor and movant in the above-captioned case, has requested production of certain documents from Mrs. Dray, and the privileged document, with which we are concerned, is among those documents. Mr. Kay has sought similar documents from the FCC through numerous FOIA requests, and the FCC has not released the documents pursuant to the FOIA's law enforcement exemption. Mr. Kay has challenged the FCC's withholding of privileged documents in the U.S. District Court for the District of Columbia. Kay v. FCC, No. 96-0660 (D.D.C. filed Apr. 4, 1996). That case has been fully briefed for summary judgment. The United States is, therefore, considering filing a Statement of Interest, pursuant to 28 U.S.C. § 517, in this case to protect the privileged document from being released to Mr. Kay.

The Department of Justice, however, will not be able to file a Statement of Interest before the scheduled hearing because this matter was only recently referred to this office and, therefore, additional time is required to consider this matter more fully

and, if appropriate, to prepare a Statement of Interest. Moreover, prior to filing a Statement of Interest, internal authorization is required. The Assistant Attorney General, Civil Division, must approve the request to file a Statement of Interest in this action. See Civil Division Directive No. 14-95, Section 1(c), reprinted in, 28 C.F.R. Part 0, Subpt. Y, App. Should we determine to file a Statement of Interest, we hope to file it on or before October 31, 1996. Of course, should the Court in the interim determine that the requested production is not relevant, as the debtors Charles and Cornelia Dray contend in their Emergency Motion to Vacate Order for 2004 Examination and Production of Documents, see Emergency Motion to Vacate Order for 2004 Examination and Production of Documents (filed Sept. 10, 1996), ¶¶ 4, 5, 7; Fed. R. Bankr. P., Rule 2004, there will be no need for the United States to put forth its views.

We appreciate your consideration of this request and apologize for its lateness.

Very truly yours,



Lori C. Hyman
U.S. Department of Justice
Attorney for Federal
Communications Commission

cc: Alan M. Lurya, Esq. (By fax & mail)
Attorney for James A. Kay, Jr.
Creditor and Movant

Naomi R. Bernstein, Esq. (By fax & mail)
Attorney for Cornelia Dray
and Charles Dray

UNITED STATES GOVERNMENT

MEMORANDUM

DATE: September 15, 1994

REPLY TO

ATTN OF: W. Riley Hollingsworth *WRH*
Deputy Chief, Licensing Division

SUBJECT: James A. Kay, Jr.
Draft, Order to Show Cause

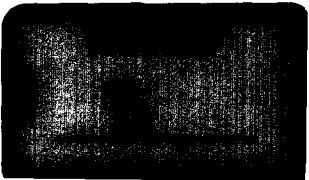
TO: Ralph A. Haller
Chief, Private Radio Bureau

THRU: Gary L. Stanford *GLS*
Chief, Licensing Division

After receiving complaints from several sources that James A. Kay, Jr. had not constructed some stations for which he holds licenses (including stations located on National Forest Service land) and that Kay falsely reports his loading, we sent Kay a § 308(b) letter requesting an inventory of his licenses, copies of Kay's forest service permits, and Kay's billing records. Kay requested and received three extensions of time, clarification of the information sought, confidentiality and some assurance that proprietary information would be kept confidential. Kay then refused to provide the information we sought stating through counsel that "there is no date...for which submission of the requested information would be convenient". Mass Media Hearing Division has indicated that they would put this case on for us. Whether they do it, or Common Carrier Enforcement or someone in PRB, it should be started very soon according to OGC. That office is handling Kay's FOIA litigation. With the present workload of the Licensing Division legal staff, it is imperative that we not put on the case, although of course my staff and the examiners would enthusiastically help out.

Our records show that Kay has more than one hundred and sixty licenses in the land mobile services concentrated in the L.A. market. He also does business and holds additional licenses under other names. His licenses include trunked and conventional SMR licenses as well as business radio service licenses. Almost all of these licenses allow Kay to provide for profit communication service.

The primary purpose of the attached order to show cause is to preserve our ability to require responses to § 308(b) letters. We feel that failing to follow through on our request for



information may jeopardize our ability to administer an effective compliance program.

We have confidence that discovery will reveal that not all of Kay's stations are constructed, and that he exaggerates his loading to avoid the consequences of our channel sharing and channel recovery provisions. We included in the draft order miscellaneous allegations including possible misuse of Commission forms. These are based on various reports received from licensees. OGC and Mass Media Hearing Division have worked with us on the Order to Show Cause and have approved it.

We have not included Appendix A which would list Kay's known licenses.

Draft
14:59 9/15/94

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

JAMES A. KAY, JR.

Order to Show Cause
why more than one
hundred sixty four Part 90
licenses should not
be revoked or cancelled.

Order to Show Cause
why Kay should not be
ordered to cease and
desist from certain
violations of Commission
rules.

ORDER TO SHOW CAUSE AND
HEARING DESIGNATION ORDER

Adopted:

Released:

By the Commission:

1. The Commission has before it for consideration more than one hundred sixty four land mobile licenses¹ authorized under Part 90 of the Commission's Rules. 47 C.F.R. § 90.1 et seq. The licensee, James A. Kay, Jr., has failed to respond to Commission requests for written statements of fact. In addition, we have reason to believe he has failed to comply with the Commission's Rules, and may not possess the character qualifications necessary to be a Commission licensee. For the reasons that follow, we will order Kay to show cause why his licenses should not be revoked or cancelled, and designate the matter for a hearing before an administrative law judge.

2. In response to complaints regarding the construction and operational status of a number of Kay's licensed facilities, on January 31, 1994, Commission staff requested additional information to determine whether Kay had committed rule violations by operating systems in the trunked mode that were licensed for conventional use and by not meeting the construction and placed-in-operation requirements of the Commission's Rules. 47 C.F.R. §§ 90.155, 90.631 and 90.633. This letter also requested information to enable the staff to determine if stations licensed to Kay have permanently discontinued operation in violation of our rules. 47 C.F.R. § 90.157. The letter also directed Kay to provide information detailing the loading of end users on Kay's base stations in order to assess Kay's compliance with our "forty mile" rule, which prohibits licensees from obtaining additional license grants within forty miles of an existing station until the existing station is loaded

¹ See Appendix A.

to 70 mobile units per channel, and to apply our channel sharing and recovery provisions. 47 C.F.R. §§ 90.623, 90.627, 90.631 and 90.633.

3. We have received complaints that some of Kay's stations are not constructed. Because many of the stations are licensed to operate from mountain peaks managed by the U.S. Forest Service in the Los Angeles area, U.S. Forest Service permits are required to construct and operate on the peaks. In order to assess compliance with our construction and operation requirement, the staff requested that Kay identify the stations for which he holds FCC licenses as well as those he manages. The staff directed Kay to note those that are on U.S. Forest Service land.

4. Information available to the Commission also includes that James A. Kay, Jr. has done business under a number of assumed names. We believe these names include some or all of the following: Air Wave Communications, John C. Allen dba Buddy Sales, Buddy Corp., Buddys Sales, Buddys Sales, Buddy Corp. dba Buddy Sales, Buddy Corp. dba Southland Communications, Consolidated Financial Holdings, Hessman Security, Roy Jensen, James Kay, James A. Kay, Jr., Lucky's Two Way Radio, Luckys Two Way Radio, Luckys Two Way Radios, MetroComm, Multiple M Enterprises, Inc., Oat Trunking Group, Oat Trunking Group, Inc., Marc Sobel dba Airwave Communications, Southland Communications, Southland Communications, Inc., Steve Turelak, Triple M Enterprises, Inc., V&L Enterprises, and VSC Enterprises. The inquiry letter sent to Kay directed that he identify all station licenses he holds under all names under which he does business.

5. The letter also requested that Kay substantiate the loading of his stations by providing customer lists and telephone numbers. Such business records are the Commission's generally acceptable proof of loading. Kay was assured that proprietary information would be considered confidential.

6. Kay filed a response that provided none of the requested information. He simply referenced some dissimilar information provided to the Commission staff at other times. Kay failed to provide the requested information after numerous extensions of time, responding at one point that "there is no date...for which submission of the requested information would be convenient". Accordingly, we will designate this matter for hearing to determine Kay's fitness to remain a Commission licensee, in light of his conduct and his refusal to respond to the Commission inquiry.

7. We have also received complaints from various parties that James A. Kay, Jr. misused the Commission's processes. For example, licensees have complained that Kay has fraudulently induced them to sign blank Commission forms seeking modification of license. Kay allegedly then uses the form to cancel the licenses.

8. Accordingly, IT IS ORDERED that pursuant to Section 312(a) of the Communications Act of 1934, as amended, James A. Kay, Jr. is directed to show cause why his licenses should not be revoked or cancelled² at a hearing before an Administrative Law Judge, at a time and place to be designated in a subsequent Order, upon the following issues:

a) To determine whether James A. Kay, Jr. has abused the Commission's processes by failing to respond to a Commission inquiry;

b) To determine whether James A. Kay, Jr. has violated Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17, by failing to respond to a Commission inquiry;

² Several of the rule violations discussed above are subject to an automatic cancellation condition: if the licensee does not meet his or her construction deadline, or if the licensee permanently discontinues operation, the license cancels automatically. See e.g., 47 C.F.R. §§ 90.157, 90.631 and 90.633.

c) To determine whether James A. Kay, Jr. has exceeded his license authority by operating systems in the trunked mode that were authorized for conventional use and to determine if he has violated any of the following: Sections 90.155, 90.157, 90.623, 90.627, 90.631, and 90.633 of the Commission's Rules, 47 C.F.R. §§ 90.155, 90.157, 90.623, 90.627, 90.631, and 90.633;

d) To determine if any of James A. Kay, Jr.'s licenses have automatically cancelled as a result of violations listed in subparagraph (c);

e) To determine whether James A. Kay, Jr. has misused the Commission's processes in order to defraud other licensees;

f) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether James A. Kay, Jr. is qualified to remain a Commission licensee; and

g) To determine whether Kay should be ordered, pursuant to Section 312(b) of the Communications Act of 1934, as amended, to cease and desist from violation of Commission Rules 1.17, 90.155, 90.157, 90.623, 90.627, 90.631, 90.633, 47 C.F.R. §§ 1.17, 90.155, 90.157, 90.623, 90.627, 90.631, 90.633.

9. IT IS FURTHER ORDERED that the above issues be consolidated for hearing pursuant to Section 1.227(a)(2) of the Commission's Rules.

10. IT IS FURTHER ORDERED that the Chief, Private Radio Bureau SHALL BE a party to the proceeding.

11. IT IS FURTHER ORDERED, that to avail themselves of the opportunity to be heard, the parties, pursuant to Section 1.91(c) of the Commission's rules, in person or by attorney, shall file with the Commission within thirty (30) days of the receipt of the Order to Show Cause and Hearing Designation Order a written appearance stating that they will appear at the hearing and present evidence on the matters specified in the Order. If a party fails to file an appearance within the time specified, the right of that party to a hearing shall be deemed to have been waived. See Section 1.92(a) of the Commission's rules. Where a hearing is waived, a written statement in mitigation or justification may be submitted within thirty (30) days of the receipt of the Order to Show Cause and Hearing Designation Order. See Section 1.92(a) of the Commission's rules. In the event the right to a hearing is waived by all the parties to this proceeding, the presiding Officer, or the Chief Administrative Law Judge if no presiding officer has been designated, will terminate the hearing proceeding and certify the case to the Commission in the regular course of business and an appropriate order will be entered. See Section 1.92(c) of the Commission's rules.

12. IT IS FURTHER ORDERED that the burden of proceeding with the introduction of evidence and the burden of proof shall be on the Private Radio Bureau.

13. IT IS FURTHER ORDERED that the Secretary send a copy of this order via certified mail-return receipt requested to Dennis K. Brown, Esquire, Brown and Schwaninger, P.C., 1835 K Street N.W., Suite 650, Washington, D.C. 20006. and have this order or a summary thereof published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Response to
Interrogatories.

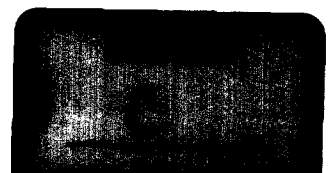
Before the
COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In tl) WT DOCKET NO. 94-147
JAMES A. KAY, JR.)
Licensee of one hundred sixty four Part 90)
Licenses in the Los Angeles, California, Area)

To: James A. Kay, Jr.

**WIRELESS TELECOMMUNICATIONS BUREAU'S
RESPONSE TO KAY'S FIRST SET OF INTERROGATORIES**

1. On February 10, 1995, Kay served interrogatories on the Chief, Wireless Telecommunications Bureau. Pursuant to Sections 1.311, 1.313(b) and 1.323 of the Commission's Rules, the Bureau hereby submits its response.
2. For convenience, a prefix has been added to each interrogatory reflecting the particular paragraph of the Order to Show Cause, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, FCC 94-315 (released December 13, 1994) ("HDO") to which the interrogatory refers. For example, Kay's second interrogatory relating to paragraph 3 of the HDO is identified as "Interrogatory 3-2."
3. As a threshold matter, the Commission's Rules restrict the extent to which Commission employees may be questioned by written interrogatories. Thus, § 1.311(b)(3) specifically states that:



Commission employees may be questioned by written interrogatories regarding the existence, nature, description, custody, condition and location of Commission records, but may not be questioned concerning their contents unless the records are available (or are made available) for inspection under Section 0.451 through 0.467. See 0.451(b)(5) of this chapter.

Furthermore, § 1.311(b)(4) provides that:

Subject to paragraphs (b)(1)¹ through (3) of this section, Commission personnel may be questioned generally by written interrogatories regarding the existence, description, nature, custody, condition and location of relevant documents and things and regarding the identity and location of persons having knowledge of relevant facts, and may otherwise only be examined regarding facts of the case as to which they have direct personal knowledge. (footnote added).

4. As revealed below, certain of Kay's interrogatories seek information which is clearly not discoverable under the Commission's Rules. Indeed, the Bureau strongly objects to those interrogatories which seek, directly or indirectly, to have the Bureau prematurely present its case prior to the commencement of the hearing in this proceeding. Documentary exhibits, facts, and the identity of witnesses will be provided by the Bureau to Kay on the specified exchange date.

¹ Section 1.311(b)(1) of the Commission's Rules states that "[t]he informer's privilege shall encompass information which may lead to the disclosure of an informer's identity.

INTERROGATORIES

With respect to Paragraph 1 of the HDO:

Interrogatory: 1-1. Please state each fact on which the Commission relies for its position that Kay holds one hundred sixty four land mobile licenses authorized under Part 90 of the FCC Rules.

Response: Kay holds land mobile licenses in his own name and controls other entities that hold land mobile licenses. Kay has refused to provide further written statements of fact, as required by § 308(b) the Communications Act of 1934, as amended, identifying the names under which he holds licenses. This information was specifically requested by the Bureau. (See Interrogatory 1-2). The Bureau believes that the 164 FCC licenses identified in Appendix A to the HDO are owned or controlled by Kay. The list was compiled by routine searches of the Commission's licensing data base under the listed names. Of the 164 licenses identified in Appendix A of the HDO, 147 are licensed to Kay. The Bureau believes that the remaining licenses are or may be attributable to Kay based on Kay's apparent involvement in signing FCC licensing forms for several other entities, including Buddy Corp., Oat Trunking Group, and Multiple M Enterprises, and Kay's close business ties to Marc Sobel.

Interrogatory: 1-2. Please state each fact on which the Commission relies for its position that Kay failed to respond to Commission requests for written statements of fact required under Section 308 of the Communications Act of 1934 as amended.

Response: On February 17, 1995, there was served on Kay the Wireless Telecommunication Bureau's Requests for Admissions and Genuineness of Documents. Included therein, at Nos. 4-22, were copies of the Bureau's multiple requests for further written statements of fact as

well as Kay's replies thereto. The Bureau believes that these documents, which are incorporated herein by reference, encompass the facts sought in this interrogatory.

Interrogatory: 1-3. Please identify by date of request and date of failure to respond each instance in which Kay failed to respond to a Commission request for a written statement of fact required under Section 308 of the Communications Act of 1934 as amended.

Response: Information responsive to this request is included in the response to the preceding interrogatory.

Interrogatory: 1-4. Please state with particularity each fact which Kay failed to supply in response to a Commission request for a written statement of fact required under Section 308 of the Communications Act of 1934 as amended which is relevant to a determination whether any license granted to Kay should be revoked.

Response: Information responsive to this request is included in the response to Interrogatory 1-2.

Interrogatory: 1-5. Please state each fact ascertained by investigation or contained in any complaint which forms any part of the basis of the Commission's belief that Kay has failed to comply with the Act and the Commission's Rules.

Response: This interrogatory is grossly overbroad in its scope. Not only is it not narrowly tailored to seek specific information, the interrogatory prematurely seeks the Bureau's case and ignores the Presiding Judge's Order, FCC 95M-28 (released on February 1, 1995), specifying May 26, 1995, as the Bureau's exhibit exchange date.

Interrogatory: 1-6. Please state each fact ascertained by investigation or contained in any complaint which forms any part of the basis of the Commission's belief that Kay may not possess the character qualifications necessary to be a Commission licensee.

Response: This interrogatory is overbroad and goes beyond the scope of substantive violations by Kay identified in Paragraph 1 of the HDO. There have been raised substantial and material questions of fact as to whether Kay has violated the Act and/or the Commission's rules. Incorporated by reference herein are the responses to interrogatories 1-2, 2-1, 2-5, 2-7, 2-8, 3-2, 4-1, and 5-1.

Interrogatory: 1-7. With respect to paragraph 1 of the HDO, do you intend to examine Kay on any matters not discussed in these interrogatories?

Response: This interrogatory is overbroad and requests information relating to the Bureau's litigation strategy. It is plainly not discoverable under Section 1.311(b) of the Commission's Rules. The Bureau intends to examine Kay regarding all matters relevant to the issues designated in the HDO.

Interrogatory: 1-8. If the answer to the preceding interrogatory is in the affirmative, please specify each matter or instance not discussed in these interrogatories upon which you intend to rely.

Response: See response to preceding interrogatory.

With regard to Paragraph 2 of the HDO:

Interrogatory: 2-1. Please identify each and every complaint which the Commission has received regarding the construction or operation of any of Kay's licensed radio facilities.

Response: This request is overbroad in that it is not limited in time, and may include complaints which did not form the basis for the HDO. It also seeks to have the Bureau reveal the identity of informants, and, as such, is not discoverable under the Commission's